ONG KIAT CHAI

v.

BANDAR RAYA DEVELOPMENT BHD.

HIGH COURT MALAYA, KUALA LUMPUR
WAN HAMZAH J
[CIVIL SUIT NO. 1530 OF 1978]
6 MARCH 1984

CONTRACT: *Agreement to construct a house - Delay - Whether defendant liable - Terms of agreement inconsistent with rules - Whether contract void - Acquiescence - Frustration.*

The plaintiff entered into an agreement with the defendant, a licensed housing developer, whereby the plaintiff bought a piece of land from the defendant together with a house to be constructed thereon by the defendant not later than 11 September 1975, that is within eighteen months. Possession was delivered only on 15 December 1977. The plaintiff sued for damages for the delay. The defendant contended that the building was completed within the extended time provided by Clause 19 of the agreement. It contended on the alternative ground that the agreement was void by reason of the contravention of Clause 19 of r. 12 (1) (o) (providing of completion not later than 18 months) and Clause 20 of r. 12 (1)(r) (providing for indemnity in case of delay) of the Housing Developers (Control and Licensing) Rules 1970 ("the Rules"). Defences of acquiescence by conduct and frustration of contract were also pleaded.

Held:

[1] Clauses 19 and 20 of the agreement were inconsistent with the Rules.

[2] However, the clauses were not "consideration" or "object" as contemplated in s. 24, Contracts Act, as to render the agreement void.

[3] Further, the clauses were void only to the extent of their inconsistencies with the Rules.

[4] The provisions of r. 12 (1) (o) and of r. 12 (1)(r) were implied in the agreement. The defendant must compensate the plaintiff for the delay, the amount of indemnity to be calculated from day to day commencing immediately after the date of delivery of vacant possession specified in the agreement. The extension of time was ineffective.

[5] The alleged acquiescence by conduct on the part of the plaintiff had not been shown by evidence or otherwise.

[6] There was no frustration of contract. In fact, the building had been completed and vacant possession delivered. The true position was that there was delay in the defendant's performance.

[Judgment for the plaintiff.]

Case referred to:
S.E.A. Housing Corporation Sdn. Bhd. v. Lee Poh Choo [1982] 2 MLJ 31; [1982] 2 MLJ 31

Legislation referred to:
Housing Developers (Control and Licensing) Rules 1970, rr. 12(1)(o), 12(1)(r)
Contracts Act 1950, s. 24.

For the plaintiff - Chan Hua Eng (Ginny Lee with him); M/s. Shearn Delamore & Co.
For the defendant - V. C. George (K.S. Naranan with him); M/s. Ng Ek Teong & Partners.

JUDGMENT

Wan Hamzah J:

On 12 March 1974 the plaintiff entered into an agreement with the defendant (a licensed housing developer) whereby the plaintiff bought a piece of land from the defendant together with a house to be constructed thereon by the defendant, at the price of RM94,800. It was agreed that the defendant should complete the building and deliver possession within eighteen months, i.e. not later than 11 September 1975. There was delay in the completion of the building, and possession was delivered only on 15 December 1977. The plaintiff sues the defendant for damages for the delay. The defendant denies liability. The main ground of defence is stated in para. 4 of the statement of defence as follows:

(a) It was a condition of the Sale Agreement that the defendant should not be liable for any delay occasioned by strike or combination of workmen, lockout, riot, civil commotion, force majeure, exceptionally inclement weather, loss or damage by fire, flood or tempest, or other like cause beyond the Vendor's control; and

(b) The delay in erecting the said house and in completing and delivering vacant possession to the plaintiff has been caused *inter alia* by circumstances beyond the defendant's control as follows:

(1) A national shortage of building materials in Malaysia during the year 1974 onwards and in particular a shortage of cement, steel aggregates, roof tiles and bricks;

(2) A national shortage of skilled labour which was caused by the heavy increase in housing development in Malaysia;

(3) A delay in the approval of the plans for a central sewerage system by Dewan Bandaraya which delayed work in completing and delivering vacant possession of the house to the purchaser;

(4) Delay arising from earthwork, contractor,s financial difficulties and in getting certificate of fitness from the City Hall.

For the above ground the defendant relies on Clause 19 of the agreement, which reads as follows:

> If the Purchaser shall have paid to the Vendor all instalments and other moneys payable under this Agreement as and when they become due, the Vendor will complete and deliver vacant possession of the said Lot and Building free from all encumbrances to the Purchaser within eighteen (18) months from the date hereof PROVIDED THAT if in the opinion of the Vendor's architect completion or delivery of vacant possession of the said Building is delayed by reason of exceptionally inclement weather, civil commotion, strikes, lock-outs, the acts of the King's enemies, fire, floods or other accident to the works, force majeure or any other cause beyond the Vendor's control or by reason of the Purchaser requiring the execution of extra changes or alterations to the said Lot or Building then and in any of such cases the Vendor's architect shall make a fair and reasonable extension of time for completion and delivery of vacant possession of the said Lot and Building.

Evidence was adduced for the defence to show that delay in completion of the building was caused by the delay in the completion of earthwork by a contractor, the delay of the City Hall in giving approval of sewerage plan, shortage of building materials and labour and inclement weather. Evidence was also adduced to show that the delay in giving possession of the house to the plaintiff was due to the delay of the City Hall in issuing certificate of fitness. The defence also called the architect to testify that in view of the various reasons,

in his opinion the 27 months' delay in the completion of the building was reasonable. The defence case is that in accordance with Clause 19 the architect had granted a fair and reasonable extension of time for completion and delivery of vacant possession, and that the building was completed and delivery of vacant possession of the house was given to the plaintiff within the extended time.

As an alternative ground of defence it is contended that the agreement is void by reason of the fact that Clause 19 contravenes r. 12 (1) (o) of the Housing Developers (Control and Licensing) Rules 1970 which provides:

> Every contract of sale...shall contain within its terms and conditions, provisions to the following effect, namely ... provisions specifying the date of the delivery of the vacant possession of the housing accommodation to the purchaser which date shall not be later than 18 months after the date of signing of the contract of sale.

On the same alternative ground of defence it is also contended that Clause 20 of the agreement contravenes r. 12(1)(r) which provides:

> Every contract of sale ... shall contain within its terms and conditions provisions to the following effect, namely ... provisions binding on the licensed housing developer that he shall indemnify the purchaser for any delay in the delivery of the vacant possession of the housing accommodation. The amount of Indemnity shall be calculated from day to day at the rate of not less than eight per centum per annum of the purchase price commencing immediately after the date of delivery of vacant possession as specified in the contract of sale.

Clause 20 of the agreement reads:

> In the event the Vendor shall fail to complete and deliver vacant possession of the said lot and building to the Purchaser within the time specified or within such extended time as may be allowed by the Vendor's architect under Clause 19 hereof the Vendor shall pay to the Purchaser compensation calculated from day to day commencing from the date of delivery of vacant possession as specified in Clause 19 herein to the date of actual delivery of vacant possession of the said lot and building at the rate of eight per centum on the purchase price.

It was submitted that since Clause 19 and 20 of the agreement contravene the Rules, they are forbidden by law. It was also submitted that the two clauses, if permitted, would defeat the law, and that they are opposed to public policy. It is further submitted that for these reasons the consideration and object of the agreement are unlawful and the agreement is therefore void under s. 24 of the Contracts Act, which provides:

> The consideration or object of an agreement is lawful, unless:
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> (a) it is forbidden by a law;
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> (b) it is of such a nature that, if permitted, it would defeat any law;
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> (c) it is fraudulent;
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> (d) it involves or implies injury to the person or property of another; or
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> (e) the Court regards it as immoral, or opposed to public policy.
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> In each of the above cases, the consideration or object of an agreement is said to be unlawful. Every agreement of which the object or consideration is unlawful is void.

I agree that Clause 19 and 20 are inconsistent with and contravene the Rules in that Clause 19 authorises the architect to allow extension of time for completion and delivery of vacant possession in cases of delay caused by an event beyond the vendor's control, whereas there

is no provision in the Rules giving such authority to the architect and r. 12 (1)(o) requires delivery of vacant possession to be given not later than 18 months from the date of the agreement; and Clause 20 provides for compensation to be computed from the end of the extended time allowed by the architect whereas r. 12(1)(r) provides for compensation to be computed from the date of delivery specified in the agreement which should not be later than 18 months from the date of the agreement. But in my opinion Clause 19 and 20 are not consideration or object as contemplated in s. 24 of the Contracts Act. The consideration and object contemplated in that section are those which are of the kind shown in the various illustrations in that section. Therefore in my judgment it is not correct to say that the consideration or object of the agreement in this case is unlawful by reason that Clause 19 and 20 contravene the Rules. The contravention does not render the agreement void. On the question whether the agreement is void, in my opinion guidance can be taken from the judgment of the Federal Court in the case of *S.E.A. Housing Corporation Sdn. Bhd. v. Lee Poh Choo* [1982] 2 MLJ 31. In that case the respondent had agreed to purchase certain property from the appellants and it was a term of the agreement that the building on the said property should be completed within a period of eighteen months from the date of the agreement. The building was only completed some twenty three months after that date. The respondent sued the appellants for damages for breach of contract. The appellants claimed that they were protected by Clause 32 in the agreement which reads:

> The vendor shall not be liable to the purchaser for any failure to fulfil any terms of this Agreement if such fulfilment is delayed, hindered or prevented by force majeure including but not limited to acts of God strikes lockouts civil commotion acts of war or the disability of contractors and subcontractors employed by the vendor either commencing, carrying on or completing their work or failure to obtain any necessary sanction or approval of any local authority or any other circumstances of whatever nature beyond the control of the vendor.

The Federal Court held that the Clause 32 of the agreement in that case was inconsistent with r. 12 (1)(r) of the Housing Developers (Control and Licensing) Rules 1970 and that it was void because of the inconsistency, but the Federal Court treated the agreement as valid and upheld the award of damages for breach of the agreement. Accordingly I hold that Clause 19 and 20 of the agreement in the present case are void to the extent of their inconsistencies with the Rules, and that the provisions of r. 12(1)(o) and of r. 12(1)(r) are implied in the agreement, so that the defendant had to deliver vacant possession of the house to the plaintiff not later than 18 months from 12 March 1974 which was the date of the agreement, and the defendant should indemnify the plaintiff for the delay of the delivery of the vacant possession, and the amount of indemnity should be calculated from day to day at the rate of 8 per centum per annum of the purchase price commencing immediately after the date of delivery of vacant possession so specified, i.e. commencing from 12 September 1975. Since that part of Clause 19 which authorises the architect to allow extension of time for completion is void for contravention of the Rules, it follows that the extension of the time allowed by the architect is of no effect and irrelevant.

As a further ground of defence it was pleaded that there was acquiescence by conduct of the plaintiff, but the defence has not shown by evidence or otherwise such alleged conduct.

As a further alternative ground of defence it was contended that performance of the agreement became without any fault on the part of the defendant impossible and the agreement was frustrated and the defendant is thereby discharged from performance. In my opinion it is not correct to say that the agreement became impossible of performance. In fact the defendant had performed in so far as the defendant had completed the building and delivered vacant

possession. The true position is that there was delay in the defendant's performance. The agreement itself contains provision for compensation for such delay, and the Rules provide for remedy for the delay.

I give judgment for the plaintiff in the sum of RM17,100 being the amount of indemnity in respect of the delay in the delivery of vacant possession from 12 September 1975 to 14 December 1977 with interest thereon at 6% per annum from the date of the filing of the Writ to the date of realisation, and costs.

Also found at [1984] 2 CLJ 117